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IN THE

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Petitioners,

v.

KELLY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE [1]

The Chamber of Commerce of the United States ("Chamber"), founded in 1912, is the world's largest not-for-profit business federation with an underlying membership of over 3,000,000 businesses and business associations. A central function of the Chamber is to represent the interests

[1] All parties have consented to the filing of this brief *amicus curiae*, as indicated by letters of consent filed with the Court. This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

of its members in important matters before the courts, legislatures, and executive branches of state and federal governments. In so doing, the Chamber regularly files briefs *amicus curiae* in numerous cases vital to the business community, including cases pertaining to political speech. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Elections Bd. of Wisconsin v. Wisconsin Mfrs. and Commerce*, 597 N.W.2d 721 (1999), *cert. denied*, 528 U.S. 969 (1999). The Chamber also has litigated to preserve its own First Amendment rights of speech and association. *See Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995).

In order to properly represent its members' interests, the Chamber collects and disseminates information about public issues and officials. In particular, the Chamber has a long-standing interest in reforming state judiciaries. In 1998, it established the Institute for Legal Reform ("ILR"), an affiliated not-for-profit organization devoted exclusively to judicial reform. The ILR is extremely active in raising awareness among the Chamber's members and the public at-large about the business-related issues surrounding the courts, judges, and candidates running for judicial and other public offices. Chamber members rely on the information provided by the Chamber and the ILR to form opinions about the judiciary, including candidates. In addition, the information allows the Chamber's members to assess whether Chamber and ILR activities are truly representative of the members' interests.

The issues at stake in this case are of direct concern to the Chamber and its members. The Chamber is committed to ensuring that state judiciaries remain impartial arbiters of the law. However, when state legislatures submit the selection of judges to the electorate, the voters must be afforded access to relevant information about the candidates. In upholding the "announce" clause of the Minnesota Code of Judicial Conduct, the Court of Appeals for the Eighth Circuit

reinforced a restriction on candidate information necessary for the public to make informed electoral decisions. The Chamber and its members have a strong interest in maintaining their constitutional right to receive truthful non-prejudicial information in order to intelligently participate in American democracy.

SUMMARY OF ARGUMENT

For the Chamber to exercise its First Amendment right to disseminate information about judicial candidates, its First Amendment right to receive information from judicial candidates and incumbents may not be restricted. The announce clause is a direct violation of this right. Furthermore, even if the "announce" clause is upheld, its speech restrictions must be expressly limited to ensure that the Chamber's First Amendment right to independently disseminate information about the judiciary is not infringed.

ARGUMENT

The Minnesota Code of Judicial Conduct's "announce" clause forbids a candidate for election to judicial office to "announce his or her views on disputed legal or political issues." Minnesota Code of Judicial Conduct; Canon 5A(3)(d)(i). Thus, judicial candidates are relegated to saying, for example, that they will "protect constitutional rights." Statements about "the proper role of stare decisis, narrow or strict construction, original intent and substantive due process" are banned. *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 894 (8th Cir. 2001) (Beam, J., dissenting). This is so even though candidates' views may otherwise be public. Perhaps an incumbent judge has already written a judicial opinion on the matter, or a candidate has previously authored an article in which he or she has stated a view. Yet, Canon 5 prohibits truthful statements by candidates about their political, legal, and ideological views. It does not prohibit them from having such views.

Thirty-nine of the fifty states have chosen to elect their judges. *See* Roy A. Schotland, *Introduction: Personal Views*, 34 Loy. L.A. L. Rev. 1361, 1365 (2001). Of 1,243 state appellate judges, fifty-three percent face contestable elections for initial terms. *Id.* Of 8,489 state trial court judges of general jurisdiction, seventy-six percent face some form of contestable election for initial terms. *Id.* Eighty-seven percent of all state appellate and trial judges face some sort of election for subsequent terms. *Id.*

Included in these statistics are members of Minnesota's judiciary. The important civic duty of voting obligates voters, like Minnesota voters, to obtain information about judicial candidates. Civic organizations, like the Chamber, participate in the dissemination of such information. There are candidates, like petitioner Gregory Wersal, who are willing to help citizens carry out this responsibility by providing relevant information to the public. Yet, the "announce" clause forbids them from doing so.

The public, including the Chamber and its members, are left to rely on speculation and inference. The "announce" clause prohibits the flow of more direct and substantial information because it limits judicial candidate campaign speech to mere platitudes. In addition, speech by independent third parties is equally ineffectual in aiding voters because third parties must rely on the same inadequate information.

This result is in direct conflict with the free speech rights ensured by the First Amendment.

I. THE "ANNOUNCE" CLAUSE VIOLATES THE FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION FROM A WILLING SPEAKER.

Freedom of speech not only entails the right to speak freely, but the right to receive information. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("the

First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw"); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("This freedom (of speech and press) . . . necessarily protects the right to receive it."). In particular, the First Amendment protects the right to receive political, social, and other information related to the functioning of government, see *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)), including information about "candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966). Without such a right, the First Amendment's universally recognized purpose of free discussion of public affairs in which truth will ultimately prevail cannot be achieved. *See id.*; *Kleindienst*, 408 U.S. at 763 (1972) (citing *Red Lion Broad. Co.*, 395 U.S. at 390). When free and truthful discussion about government affairs is stifled, this country's fundamental principal of self-governance is sacrificed. *See Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

The "announce" clause unreasonably restricts information about judicial candidates to the public in violation of the public's constitutional right to receive such information. By treading on this right, the "announce" clause has artificially limited public debate about the judiciary and its members at a level far below that envisioned by the First Amendment or that which is necessary to preserve the independence of the judiciary. The First Amendment's purpose in fostering vigorous public debate about all three branches of government is to maximize the democratic nature of government. The "announce" clause's limitation on public access to information about the judiciary and its members directly and unreasonably limits debate about public affairs.

Of course, First Amendment protections are not absolute. Compelling governmental interests exist to restrict some speech of judicial candidates and incumbents, and can perhaps justify a corresponding restriction on the ability of the public to receive such speech. In particular, if judges or candidates for the bench make promises to decide cases in a certain way, litigants who appear before them may be denied their due process right to a fair and impartial trial (though recusal procedures often may be a more tailored and less intrusive remedy that does not infringe upon First Amendment rights). The Minnesota Code of Judicial Conduct addresses restrictions of this type in Canon 5A(3)(d)(i) which prohibits "pledges and promises." The court below justified the much broader "announce" clause with the same due process rationale, concluding that the "announce" clause is necessary to "reach the full range of campaign activity that can undermine the State's interests in an independent and impartial judiciary." *Republican Party of Minnesota*, 247 F.3d at 877.

However, the same state interest in an independent and impartial judiciary that justifies the narrower restriction on "pledges and promises" found in Canon 5A(3)(d)(i) cannot similarly justify the "announce" clause's much more sweeping prohibition on *all* speech regarding "disputed legal or political issues." The "announce" clause casts its net far too wide to survive constitutional scrutiny.[2] As recognized by the Seventh Circuit Court of Appeals, "[t]here is almost no legal or political issue that is unlikely to come before a judge

[2] The overbreadth of the "announce" clause was implicitly recognized by the American Bar Association which amended a similar provision of its Model Code of Judicial Conduct by limiting its reach to "'statements that *commit or appear to commit* the candidate with respect to cases, controversies or issues that are likely to come before the court.'" *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 879-80 (8th Cir. 2001) (emphasis added).

of an American court." *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229 (1993). Therefore, the "announce" clause prohibits almost all speech by incumbents and candidates, the content of which is critical to public discussion, evaluation, and voting. By decreasing the flow of information to the public, the "announce" clause does more harm to public debate about the judiciary than good to the due process rights of future litigants.

The "announce" clause diminishes constitutionally protected discussion of the judiciary in another, more subtle way. The "announce" clause eliminates the most accurate and useful sources of information about the judiciary, *i.e.*, the candidates. The result is that the truthfulness and integrity of public discussion about the judiciary is compromised because public debate is left to secondary and less knowledgeable speakers, third parties who are independent of a candidate or her campaign. Independent speakers may be less informed because they must glean information about judicial candidates from sources other than the primary ones. The inevitable result is that debate about the judiciary is fueled by information that may be incomplete, inaccurate, or unreliable. The First Amendment's objective to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail is thereby thwarted.

II. ANY HOLDING THAT THE "ANNOUNCE" CLAUSE IS CONSTITUTIONAL CANNOT JUSTIFY SIMILAR CONTENT RESTRICTIONS ON THE SPEECH OF INDEPENDENT THIRD PARTIES.

Any holding that the "announce" clause is constitutional should be limited to the speech of candidates for judicial office and not to the speech of independent third parties.[3]

[3] Though *certiorari* was granted only with respect to the "announce" clause and its effect on incumbents and candidates in judicial elections,

The First Amendment protections separately afforded independent third party speech in the electoral and judicial speech contexts are some of the strongest and most important known to American law. These two separate lines of jurisprudence necessitate that any holding permitting content-based restrictions on judicial candidate speech must be clearly demarcated to avoid inhibiting similar speech by independent third parties.

A. Electoral speech by independent third parties is core First Amendment speech required by the public to make informed electoral decisions.

Prohibitions on electoral speech by independent third parties are unconstitutional because they limit "the ability of the citizenry to make informed choices among candidates for office." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).[4] This Court has "recognized repeatedly that 'debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution.'" *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989) (quoting *Buckley*, 424 U.S. at 14). The only government interest compelling enough to justify restricting expenditures for electoral speech is the possibility of corruption or the appearance thereof. *See Buckley*, 424 U.S. at 45. However, corruption is impossible when expenditures for speech by third parties are made independent

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the precedential effect of a decision generally upholding the "announce" clause could be interpreted as a basis upon which the speech rights of independent third parties may also be restricted.

[4] The only exception to this categorical rule is that speech by corporations or labor organizations that includes express words of advocacy of the election or defeat of clearly identified candidates can be constitutionally regulated. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-49 (1986) (interpreting 2 U.S.C. § 441b).

of the candidates. *See id.* at 47-48 ("[u]nlike contributions, . . . independent expend-itures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive" thereby "alleviat[ing] the danger that expenditures will be given as a quid pro quo"). As core First Amendment expression, independent third party electoral speech receives the highest constitutional protection. *See id.*

In the event that the Court determines that judicial candidate speech can be constitutionally restricted, the line between candidate speech and speech by independent third parties must be clearly demarcated. A ruling without such a bright-line distinction might be read to permit restrictions on electoral speech by independent third parties. Such restrictions would offend the First Amendment by suppressing core expressive activity and inhibiting the ability of the American people to comment on issues raised by judicial campaigns and to make informed electoral decisions.

B. Discussion of the judiciary by independent third parties is fundamental First Amendment speech necessary for adequate public scrutiny of government institutions.

The First Amendment prohibits restrictions on independent third party speech about the judiciary because "operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality). The purpose of such vigorous First Amendment protection is to allow for public scrutiny of judicial affairs in order to guard against miscarriages of justice. *See Landmark Communications*, 435 U.S. at 839; *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). Public scrutiny of the judiciary allows the citizenry to act as "the final judge of the proper conduct

of public business," a role "of critical importance to our type of government." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

As recognized by the court below, First Amendment protection of independent third party judicial speech, and speech about judicial candidates in particular, is nearly absolute. "'The governme... does not and cannot have a legitimate interest in silencing the speech of third parties about the qualifications and political views of candidates for [judicial] offices.'" *Republican Party of Minnesota*, 247 F.3d at 874 (quoting *California Democratic Party v. Lungren*, 919 F. Supp. 1397, 1402 (N.D. Cal. 1996)).

In addition, the government's interest in "judicial integrity" cannot justify limiting independent speech by third parties. A state's interest in "judicial integrity" is based on the notion that the government may regulate physical conduct that interferes with the orderly administration of justice. *See Cox v. Louisiana*, 379 U.S. 559, 562 (1965), *reh'g denied*, 380 U.S. 926 (1965). Therefore, "judicial integrity" can only justify restrictions in the form of "reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important government interest unrelated to the restriction of communication." *Buckley v. Valeo*, 424 U.S. 1, 18 (1976) (citing *Cox v. Louisiana*, 379 U.S. 559 (1965)).

Any restriction on judicial speech must be strictly confined to judicial candidates. A holding that can be construed to limit speech of independent third parties will directly conflict with the First Amendment and this Court's precedents that ensure free and robust public commentary about the judiciary. More significantly, limitations on independent third party speech will result in a less informed citizenry ill equipped to maintain a vigilant watch over the government.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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